

STATE OF MAINE

DEPARTMENT OF MARINE RESOURCES

IN THE MATTER OF THE APPLICATION OF)	
RALPH L. SMITH FOR AN AQUACULTURE)	FINDING OF FACT,
LEASE LOCATED OFF OLD POINT, LAMOINE,)	CONCLUSIONS OF LAW, AND
HANCOCK COUNTY, MAINE)	DECISION

On October 4, 2000, Ralph L. Smith of Jonesport, Maine applied for an aquaculture lease totaling 89.78 acres of coastal waters in the Jordan River off Old Point, Lamoine, Hancock County, Maine. The applicants requested the lease for a term of 10 years for the purpose of cultivating blue mussels (*Mytilus edulis*).

Approval of aquaculture leases is governed by 12 M.R.S.A. §6072. This statute provides that a lease may be granted by the Commissioner of the Department of Marine Resources (DMR) if it is determined that the project will not unreasonably interfere with the ingress and egress of riparian owners, navigation, fishing or other uses of the area; the ability of the site and surrounding areas to support ecologically significant flora and fauna; or the use or enjoyment within 1,000 feet of municipally, state, or federally owned beaches, parks, or docking facilities. The Commissioner must also determine that the applicant has demonstrated that there is an available source of organisms to be cultured for the lease site.

A public hearing on this application was held May 8, 2001, in Lamoine.

**Evidence Introduced Concerning the Nature
and Impact of the Proposed Lease**

Ralph L. Smith, the applicant, provided testimony on his application and answered questions. Exhibits 1, 2 and 4.

The applicant has been in the mussel business for 25 years and formed a mussel company Moosabec Mussels, Incorporated in 1982. He testified that he has harvested mussels since 1978 and began cultivating mussels in 1982. He testified that the Commissioner and staff

from the DMR approached him in 1979-80 to try cultivating mussels. He was unsuccessful raising mussels in 5 locations between Jonesport and Addison. He then located the area off Old Point, Lamoine and with help from Department staff evaluated the site and subsequently applied for and was granted a lease.

The applicant testified that in 2000, it came to his attention that an error had been made in his existing lease description. The area selected in the field in 1985-86, with the aid of Department staff, did not correspond to the physical location described in the official lease document. To correct this error, he has reapplied for the proposed lease area, as this is the only mechanism available to him to rectify the discrepancy.

The applicant testified that the operation originally consisted of planting seed mussels where no harvestable mussels were growing as determined with Department staff in 1985-86. Overtime the years when market size mussels were harvested the smaller mussels have been replanted. This is done using a drag and a tumbler device on the stern of a boat to sort the mussels by size, harvesting the market size and replanting the smaller mussels back on the lease. The applicant testified that overtime, by adding mussels to the bottom, there is now a sufficient substrate for a natural set of mussels to attach to and survive. Therefore, a natural set along with planted seed mussels now make up the source of mussels. Seed mussels may be taken from the wild as allowed by Department regulation.

The applicant testified that he was aware of mussel regulations enacted after the original lease was granted. He would continue to comply with those regulations under Chapter 12.02 that specifies a maximum mussel drag size of 6.5 feet (6 feet 6 inches). This regulation is more restrictive than the 7-foot maximum drag size placed on the original lease as a condition.

The applicant testified that he does not use or require the use of any riparian land. He stated that he would continue to welcome lobster fishing, described as 10 – 20 traps in the summer, duck hunting, navigation for kayaking, sailing, boating, windsurfing and the occasional swimmer. The only activity prohibited would be mussel dragging or an activity that would interfere with the mussels. The applicant stated that he has had a good working relationship with

a nearby lease holder. The proposed lease would abut the western boundary of an adjacent lease by approximately 25 to 35 feet.

The applicant explained that the harvest/unloading activities consist of placing harvested mussels in bags that are stacked on the public landing in Trenton at high tide. The bagged mussels are then picked up from the ramp as soon as the tide goes for transport by truck. The applicant testified that in an emergency due to severe weather conditions such as waves blowing hard onto the Trenton ramp creating a dangerous condition to unload there, then the landing at the Lamoine State Park would be used. The applicant testified that this has occurred no more than 5 times over the past 6 – 7 years and has always occurred due to bad weather. He stated that if the Trenton facility were closed temporarily due to a red tide or other contamination closure he would use the Lamoine State Park landing as a backup. However, he explained that the use of the State Park on a regular basis would be inconvenient and unlikely as his boat mooring and vehicles are located at the Trenton facility. He testified that he has no plans to unload mussels at a facility other than the Trenton landing except for an emergency due to weather or due to a legal closure prohibiting that facility's use for unloading mussels. He testified that he anticipated continuing his operation in the same manner as he has for the past 14 years at the Old Point location. The applicant also stated that he would terminate the existing lease if the proposed lease were granted.

A biologist employed by the Department, testified about the statutorily required site review that he conducted November 8, 2000. The Department report included the following criteria: a scuba diver survey of the local flora and fauna and bottom composition; vertical profiles of the water column which include temperature, salinity, dissolved oxygen and pH, and depths; proximity measurements of the proposed site to shore and to other leases; plus observations and documentation of local fisheries. Exhibit 3.

The biologist testified that during the dive an underwater video was taken. The dive took place about 2 hours before low tide and had an approximate depth of 12 feet with 0-10 feet of visibility throughout the dive. The poor visibility was attributed to dragging activity on the adjacent

lease just prior to the dive and reduced the visibility during the second half of the dive. The dive crossed the proposed lease from west to east. Local flora and fauna included an abundance of mussels from the existing lease activity, sand shrimp and brown benthic diatoms plus pieces of kelp and a few green crabs, lobster burrows and the common sea star. Tidal current marks or marks from drags were observed in the bottom sediments. The biologist explained that mussels are filter feeders that capture particles from the water, such as bacterial pollutants, and remove those particles and incorporate them into their body mass and shell. This activity reduces the “organic load” in the water and therefore improves the water quality. According to the biologist’s report the proposed lease is not located within a Department of Inland Fisheries and Wildlife (IF&W) essential habitat for endangered or threatened species. The nearest essential habitat ¼ mile boundary is located approximately one mile due south in Salsbury Cove for bald eagle nest BE028D.

The biologist testified that the outline of the proposed lease in figures 1 and 2 in the Department site review report represented the existing lease location and by mistake not the proposed lease boundaries as intended. He stated that the numbers and distances in the report are accurate and that the drawing of the proposed lease in the application accurately depicts its location. The biologist testified that a survey quality differential Global Positioning System (dGPS) was used to verify the proposed boundary corner locations.

The biologist observed duck hunters using the proposed lease area during the site visit. In his opinion, the proposed bottom lease does not use any structures and would therefore not interfere with navigation of the area. The proposed lease is located outside of a main navigation channel. There would be approximately 770 feet between the proposed northwest corner and the high water mark on shore; and approximately 1674 feet between the proposed northeast corner and the shore. The nearest public landing facilities are located about 3000 feet due west the Trenton airport facility and roughly 1.5 miles due east at the Lamoine Beach State Park. No moorings were observed within the proposed lease. He observed four draggers moored at the Trenton landing facility.

The depth of the proposed lease would range from approximately 5 to 14 feet at mean low water (MLW). According to the biologist's report the Department's Public Health Division the proposed lease is located in an area classified as open/approved for the harvest of shellfish and has not experienced bacterial pollution closures for the past 5 years. The area has not experienced a red tide closure for the past 10 years.

In lieu of the local harbormaster, who was unavailable, the local Marine Patrol Officer (MPO), Ron Muir was contacted by the biologist regarding ice, navigation and moorings. According to the MPO the area has the potential to ice over in the winter due to the shallow depths. Navigation of the area is limited to several mussel draggers and a few lobster fishermen. The nearest moorings are those previously described located at the Trenton landing. The MPO added that 2-3 persons fish the area for lobster, 5-8 draggers harvest mussels in the general area and that occasionally recreational fishing for mackerel takes place in the vicinity however, most mackerel fishing occurs off Lamoine State Park.

Maine Patrol Officer Muir testified that the applicant has never caused problems for enforcement and has always done everything on the up and up. He stated that he has worked the area for the past 16 years and in his opinion the leasing process now is much more rigorous than when the existing lease was granted. The Marine Patrol Officer read a letter in support of the proposed lease from a long-time lobster fisherman who could not attend the hearing.

A riparian testified in support of the proposed lease. He stated that he has used the existing lease area without any interference by the applicant for boating, sailing, duck hunting and lobster fishing. He also finds plenty of clams to dig in the intertidal shore and enjoys seeing thousands of seabirds in the vicinity. He stated that the draggers make far less noise than the traffic on the nearby Trenton (Bar Harbor) bridge. The riparian testified that he has observed the applicant unloading mussels at the Trenton ramp and stated that the mussels placed on the ramps are clean and bagged and quickly loaded into a truck.

A representative from the adjacent lease held by Great Eastern Mussel Farms testified in support of the proposed lease. He testified that he has never had any problems with the

applicant's existing lease activities and does not object to the proposed lease. He stated that he believed that the size of the existing lease was the size of the proposed lease and has operated for many years under that assumption.

Two persons who have worked with or for the applicant over the past 12 years testified in support of the proposed lease. Each person spoke well of the applicant's operation and his diligence to manage the lease well over the years.

A local resident testified that based on rumors she had heard she came to the hearing opposed to mussel farming. After listening to the testimony she testified that she had changed her mind to be supportive of the proposed lease with the new understanding that this was not a brand new activity by the applicant. Another local resident testified in support, explaining that he had paddled the proposed/existing lease area many times, unhindered. He and other residents however, expressed concern about the potential impact to the Town of Lamoine roads by heavy trucks used to transport mussels from the Lamoine State Park landing.

A dragger fisherman from Winter Harbor testified against the proposed lease. In his opinion, the proposed lease occupies an existing wild mussel bed. If the lease were granted that area would not be available to harvest by the wild mussel draggers, particularly the area off the eastern end of the Jordan River, which contains a seed mussel population designated by Department regulation. Under questioning the fisherman stated that he had only fished the area since 1993 and was not dragging the area for mussels prior to or when the existing lease was granted in 1986. He also stated that he does not fish the seed mussels in the Jordan River and has never applied for a permit to do so.

Findings of Fact

The proposed lease is located approximately 770 feet from the proposed northwest corner to the nearest shore due north-northeast and approximately 1674 feet from the proposed northeast corner to the nearest shore due northeast. A riparian owner who testified favorably about the applicant's existing operations over the years indicated that the existing and proposed lease activities have not and would not interfere with his shore and water use activities including

clam digging and navigation of the area. According to the Department's biologist and local MPO there are no mooring in the immediate vicinity of the proposed lease. According to the applicant no use of riparian lands are required or requested. Based on this evidence, I find that the proposed lease will not unreasonably interfere with the ingress and egress of riparian owners.

The proposed lease is located in shallow water depths ranging from 5 to 14 feet at MLW across the site. According to the applicant, Department's biologist and local MPO the proposed lease is not located in a navigation channel. Credible testimony by a riparian and local resident indicated that there has been no interference to navigation on the existing lease. The proposed lease activities are for bottom planting of mussels and do not include the use of any gear other than the mandatory boundary markers. Based on this evidence, I find that the proposed lease will not unreasonably interfere with navigation in the area.

According to the applicant, Department's biologist and local MPO the area has a limited lobster fishery during the summer season. According to the MPO wild mussels are harvested in the general vicinity and mackerel are fished for recreationally on occasion within the proposed lease area. A mussel dragger contended that the proposed lease is located over a commercially harvestable mussel bed. According to the existing lease decision, for which a hearing was held on January 28, 1986, "the Department surveyed the area in April and September 1985 using an underwater viewer, a small Ekman grab, and tows with a small drag. The bottom was smooth, soft mud, with occasional, small, intermittent quantities of eelgrass on the shoreward margin of the site. No animals were collected. Patches of mussels were observed just shoreward of the (proposed) lease boundary." The site at the time was found to be "little used and an unproductive area of the Jordan River" and found that it would not unreasonably interfere with other fishing activity.

According to the applicant and the Department's biologist report the western boundary of the nearest existing lease falls within 25 – 45 feet of the proposed lease. Testimony by a representative of the adjacent lease indicated the leaseholder had no objection to the proposed lease and has operated for years under the assumption that the proposed boundaries were the

original lease boundaries. According to the biologist's report the proposed lease is located in waters classified as open/approved for the harvest of shellfish.

The applicant's testimony on the existing lease development and its establishment of the mussel population within an area found to be void of mussels or having a very limited quantity by Department staff before it was originally granted is considered credible. The claim that the proposed lease area was a productive area harvested for mussels prior to 1985 is not considered credible based on the original findings and description of the Department's assessment at that time. The applicant requested that dragging by others be prohibited from the proposed lease. Based on the above, I find that the proposed lease will not unreasonably interfere with fishing, aquaculture leases, or other uses of the area with the condition that dragging be prohibited.

According to the Department biologist's report the proposed lease is not located within an IF&W designated ¼-mile boundary for an endangered or threatened species. The biologist observed blue mussels from the existing lease activities and a few other common marine organisms not present during the original site evaluation in 1985. The biologist testified on the ability of the mussel to improved water quality conditions based on their filter-feeding capacity. No evidence indicated that the proposed activities would cause any interference with the local flora and fauna and there are sufficient nutrients in the area to support the proposed operation. Based on the evidence, I find that the proposed activities will not unreasonably interfere with the ability of the site and surrounding areas to support existing ecologically significant flora and fauna.

The applicant testified that he would obtain seed mussels from existing wild mussel beds as allowed by Department regulations and from the existing lease produced naturally by the now established cultivated mussel population. Based on the above, I find that there is an available source of blue mussel seed to be cultured on this site.

According to the testimony and evidence the nearest public landing facilities are located approximately 3000 feet due west in Trenton at the airport boat landing and 1½ miles due east at

Lamoine State Park in Lamoine. The applicant testified that he would continue to operate the proposed lease as he has during the previous 14-year period on the existing lease. He testified that he would continue to use the Trenton facility to unload harvested mussels as that is where his boat is moored and vehicles are based. He would access the Lamoine State Park landing only in the event of an emergency due to severe weather conditions or in the rare event of a temporary red tide or contamination closure that would prohibit legal use of the Trenton ramp for the unloading of mussels in to the waters there. Based on this evidence, I find that the proposed lease activities will not unreasonably interfere with public use or enjoyment and that the lease site is not located within 1,000 feet of any municipally, state or federally owned beaches, parks or docking facilities.

Conclusions of Law

Based on the above findings, I conclude that:

1. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner;
2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation;
3. The aquaculture lease activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in the area with the condition that dragging by others be prohibited;
4. The aquaculture lease activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna;
5. The applicant has demonstrated that there is an available source of blue mussels, to be cultured for the lease site; and
6. The aquaculture lease activities proposed for this site will not unreasonably interfere with public use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities.

The evidence in the record supports a finding that the proposed aquaculture activities meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A.

§6072(7-A).

Decision

Based on the foregoing, the Commissioner grants the requested lease consisting of 89.78 acres to the applicant, for a period of ten (10) years from the date of this decision for the purposes of cultivating blue mussels (*Mytilus edulis*), using bottom culture techniques as described in the application and the hearing record. Whereas the applicant agreed to terminate his existing lease, which would be located within the footprint of the requested lease, if granted, the applicant shall follow applicable statutes and regulations regarding the voluntary termination of the existing lease upon completion of the execution of the requested lease. The applicant shall pay the State of Maine rent in the amount of \$50 per acre per year. The applicant shall post a bond or establish an escrow account in the amount of \$500, conditioned upon its performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

Conditions to be Imposed on Lease

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities. Conditions are designed to encourage the greatest multiple, compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the aquaculture law.

The following conditions are placed on this lease:

1. lobster and crab trapping, recreational fishing and navigation are allowed on the open areas of the lease;
2. dragging is prohibited by persons other than the leaseholder or those in his employ;
3. the lease area shall be marked in accordance with U.S. Coast Guard and Department of Marine Resources requirements;

The Commissioner may commence revocation procedures if he determines that substantial aquaculture has not been conducted within the preceding year or, that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law are not being observed, the

Commissioner may revoke the aquaculture lease.

Dated: _____

George D. Lapointe (Commissioner)
Department of Marine Resources